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TEIK HUAT FARMING SDN BHD & ORS v. MEGAT AHMAD SHAHRANI SDN BHD & ORS

HIGH COURT MALAYA, IPOH
SM KOMATHY SUPPIAH JC
[CIVIL SUIT NO: 22NCVC-88-08-2014]
B 10 SEPTEMBER 2015

TORT: *Negligence – Breach of duty of care – Claim for damages due to flooding in plaintiff's prawn farms – Whether flood caused by negligence of defendants in constructing bund and placing of culverts which blocked free flow of water –* C *Whether culverts were of inadequate capacity – Whether floods due to exceptional rainfall – Whether plaintiffs could claim for damages – Whether defendants could rely on defence of volunti non fit injuria*

TORT: *Nuisance – Flooding – Claim for damages due to flooding in plaintiff's* D *prawn farms – Whether flood caused by negligence of defendants in constructing bund and placing of culverts which blocked free flow of water – Whether bund potential nuisance due to culvert placed in bund which were of inadequate capacity – Whether bund constructed to build bridge for convenience of residents*

The plaintiffs were prawn breeders whose farms were located along a river. E The prawn farms were inundated by flood waters on the night of 19 October 2013 when the river burst its banks. A temporary bund ('the said bund') was erected by the first defendant ('DW1') to facilitate a construction of a bridge. The plaintiffs alleged that the flood was due to the negligence of the defendants in constructing the said bund which blocked the free flow of F water. In the alternative, it was pleaded that the flood was caused by the culverts placed in the temporary bund which were of inadequate capacity to provide a passage way for the flow of water. Therefore, the plaintiffs claimed, amongst others, for loss of profits and exemplary damages as a result of the flood. The claim against the defendants was brought in negligence, nuisance and strict liability. The defendants denied that the G temporary bund was the immediate reason for the damage and destruction of the plaintiffs' farms. It was alleged that the flood was inevitable as a result of exceptional heavy rain that fell. Further, the second and third defendants alleged that there was no sufficient proximity between them and the plaintiffs as to give rise to a duty of care as the bund was constructed by the first H defendant on its own initiative. The plaintiffs and the defendants, respectively, produced expert evidence to support their contentions on the cause of floods. The essential issues that arose for determination, *inter alia*, were (i) whether there was sufficient proximity between second and third defendants and the plaintiffs to give rise to a duty of care; (ii) whether the I flooding of the prawn farms was caused by the bund and/or culvert; (iii) whether the defendants were entitled to rely on the defence of maxim of *volenti non fit injuria*; (iv) whether damages sought should be awarded to the plaintiffs.

Held (allowing plaintiff's claim with costs):

(1) The first defendant's work was strictly supervised by the second defendant. DW3, as the resident engineer of the second defendant had the power to order the first defendant to stop work. Furthermore, it was DW3 who calculated the size of the culverts and confirmed that they were adequate to deal with heavy rainfall. In the light of these facts, the allegation that there was no sufficient proximity between them and the plaintiffs so as to give rise to a duty of care was not acceptable. (paras 18-20)

(2) Although the experts differed on the fundamental question as to the cause of the flood, they were unanimous in their view that if the flood had covered the area downstream from the bund, this would indicate with certainty that the bund was not the cause for the flooding. From the tide table, the tide gauge reading when the flood first occurred was the lowest tide of the day. The graph drawn by DW4, a civil and structural engineer shows that when the rain started at about 5.30pm on 19 October 2013, the tide waters had begun to retreat back towards the sea and the flooding occurred during the lowest tide around 10pm-11pm. On the aforesaid evidence, the claim that the flood occurred during high tide is unsustainable. The tidal readings negate the allegation that the flood occurred during high tide. (paras 21, 25 & 26)

(3) The culverts must have the capacity to carry heavy rainfall going into the river. In designing a culvert, it was incumbent on the defendants to consider the rainfall records of the area to determine the heaviest rainfall that the area had experienced. The culverts must meet the ten year (Annual/Rainfall Intensity ('ARI')) criteria. The culverts in the instant case were only designed to meet the five year ARI criteria and this explains why they were inadequate for the purpose of carrying the rain water and why the water overflowed. However, the rain that fell at the flood site was actually less than the five year ARI. Since the culvert was not catered even for 100mm daily rainfall, it follows that the defendants failed to meet even the five year ARI flood criteria. (paras 29-31)

(4) It was not a combination of exceptional rain and incoming high tide that had caused the flooding. The flooding would not have occurred if the river had been in its natural state and not restricted by the bund that failed to provide a culvert of adequate size to carry water from the heavy rain. The defendants were in breach of their duty to ensure that the culvert placed in the bund was of adequate size. (para 35)

(5) The concept of *volenti non fit injuria* has no application to the facts. The prawn farms were operating for many years without incident. The pond bunds had protected the ponds without a single incident until the bund

was constructed by the defendants. The plaintiffs had never consented to the creation of the bund but had opposed it. In any event, the maxim of *volenti non fit injuria* was never pleaded by the first defendant as a defence and nor was it an agreed issue for trial. In the absence of any such plea, the defence fails. (paras 37 & 38)

(6) It is trite and settled law that where a plaintiff brings an action for damages, he must prove the actual damages or the reasonable compensation for it in accordance with settled principles. In order to recover damages, he has to discharge the burden of proving both the fact of damage and the amount of damage. Any failure to prove such damages will result in the refusal of the court to award such damages. In the present case, there is no evidence to show the expenditure that the plaintiffs have incurred and would have to incur to generate the loss of profits claimed as damages. Since there was no evidence to show the amount of damages suffered by the plaintiffs as loss of profits, the court awarded nominal damages of RM50,000 to the first plaintiff and RM20,000 to the second and third plaintiffs. (paras 47, 48 & 50)

(7) The claim for exemplary damages was disallowed as the construction of the bund cannot be said be oppressive or arbitrary or an unconstitutional action by the servants of the government. The bund was constructed to enable the defendants to build a bridge for the convenience of the residents living in that area. It was not done with the intention of causing hardship and inconvenience to the prawn breeders. (para 57)

(8) The bund was a potential nuisance which became an actual and actionable nuisance by reason of the culvert placed in the bund not meeting even the five year ARI criteria. It was inadequate to carry the rain water and diverted it on to the plaintiffs' land. The law governing any acts affecting rivers in the state of Perak is found in the Waters Act 1920. The liability to pay damages under the waters act is one of strict liability. The first defendant is therefore liable to the plaintiffs for the damage suffered by them as a result of the construction of the bund. Section 17 of the waters act imposes liability on both the second and third defendants as the employer of the first defendant, to pay for the damage occasioned by the negligence of the first defendant. (paras 58-60)

(9) The second and third defendants are not only vicariously liable but also jointly and severally liable for the loss suffered by the plaintiffs. Their liability is based on the principle that if each of several persons, not acting in concert, commit a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage. (para 61)

Case(s) referred to:
Anglia Television Ltd v. Reed [1971] 3 All ER 690 ***(refd)***
Caledonian Railway v. Greenock Corporation [1917] AC 556 ***(refd)***
CCC Films (London) Ltd v. Impact Quadrant Films Ltd [1984] 3 All ER 298 ***(refd)***
Guan Soon Tin Mining Co v. Ampang Estate Ltd [1972] 1 LNS 39 FC ***(refd)***
Guan Soon Tin Mining Co v. Wong Fook Kum [1968] 1 LNS 43 FC ***(refd)***
Ismail v. Hj Taib [1972] 1 LNS 47 FC ***(refd)***
Lee Geok Theng v. Ngee Tai Hoo & Anor [2000] 1 LNS 220 HC ***(refd)***
Malaysia National Insurance Sdn Bhd v. Lim Tiok [1997] 2 CLJ 351 SC ***(refd)***
Malie Jolhi v. Pengarah Jabatan Alam Sekitar (Negeri Sarawak) Kementerian Sains, Teknologi & Alam Sekitar & Ors [2011] 5 CLJ 83 HC ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors [1997] 1 CLJ (Supp) 39 HC ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd [1984] 1 LNS 6 FC ***(refd)***
Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***
Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor [2012] 5 CLJ 229 CA ***(refd)***

Legislation referred to:
Waters Act 1920, ss. 5(1), 13, 17

For the plaintiffs - Kelvin Ding; M/s Nga Hock Cheh & Co
For the 1st defendant - Ahmad Yani (Faizul Hilmi & Nurul Jannah with him); M/s Mior & Assocs
For the 2nd defendant - Khairul Nizam Mohd Kamal; FC

Reported by S Kahvitha

JUDGMENT

SM Komathy JC:

Case For The Plaintiffs

[1] The plaintiffs are prawn breeders whose farms were located along a river. The prawn farms were inundated by flood waters at about 10.30 on the night of 19 October 2013 when the river burst its banks. The plaintiffs allege that the flood was due to the negligence of the defendants in constructing a temporary bund across the river and thereby blocking the free flow of water. In the alternative, it was pleaded the flood was caused by the culverts placed in the temporary bund which were of inadequate capacity to provide a passage way for the flow of water. They claim damages for the losses they have suffered as a result of the flood.

[2] The claim against the defendants has been brought in negligence, nuisance and strict liability.

A **Case For The Defendants**

[3] The defendants denied that the temporary bund was the immediate reason for the damage and destruction of the plaintiffs' farms. It was alleged that the flood was inevitable as a result of exceptional heavy rain that fell. The river water was unable to flow through the culverts as a result high tide
B in the downstream area which prevented the river water from flowing out to the sea, and instead pushed it upstream causing the flooding.

The Parties

[4] Teik Huat Farming Sdn Bhd, the first plaintiff, is a corporation. The
C second and third plaintiffs are partners in a firm called Ah Ning Enterprise. The first defendant, Megat Ahmad Shahrani Sdn Bhd, is a contractor appointed by the second defendant to construct a bridge to connect Kg Baru and Kg Teluk in Ayer Tawar Manjung Perak. The third defendant, the Government of Malaysia, is the employer of the second defendant.

D **Background Facts**

[5] Sometime at the end of October 2013, a temporary bund ("the bund") was erected by the first defendant's subcontractor ("DW1"), after obtaining the requisite permission from the Drainage and Irrigation Department
E ("JPS"). Permission was granted on condition that the bund would not obstruct the natural flow of the river. The bund was constructed across Sg Ayer Tawar to facilitate the construction of the bridge. The bund measured 240m in length, 12 feet 9 inches in height (from the lowest river level) and 8m wide and made of red earth.

F **[6]** Sg Ayer Tawar, the river across which the bund was constructed, is a tributary of Sg Manjung, the main river that discharges into the Straits of Malacca at Lumut. There was an 'island' in the middle of the Sg Ayer Tawar where the bund was built. The island caused the river to branch into two smaller rivers which subsequently converged downstream. The plaintiffs
G prawn farms were located on one of these two smaller rivers. During high tide, the water would not flow through the river branches but instead would flow over and submerge the island.

[7] The plaintiffs prawn farms were located upstream in relation to the bund, on the river branch of Sg Ayer Tawar, on the Kg Baru side. On the
H evening of 19 October 2013, it rained continuously from 5.30pm and at about 10.30 that night the river burst its banks and flooded the prawn farms.

The Trial

[8] I heard evidence from the plaintiffs and ten witnesses called on their
I behalf. For the defendants, I heard evidence from three of their representatives and two other witnesses. The witnesses called by the plaintiffs were:

(a) PW1 (Lim Leong Nge, a director of first plaintiff)

(b) PW2 (Ahmad Zaki bin Ahmad Saad, an officer from the meteorological department of Malaysia)

(c) PW3 (Lim Nong Chowng, a prawn farmer and director of Dindings Aquatic Supplier Sdn Bhd)

(d) PW4 (Tan Siak Kuang, a seller of prawn fry)

(e) PW5 (Ong Ching Chock, a prawn harvester/seller)

(f) PW6 (Sim Yeow Tiam, a prawn harvester/seller)

(g) PW7 (Tan Teong How, a prawn harvester/seller)

(h) PW8 (Ling Ka Lee, a contractor)

(i) PW9 (Lim Chee Soon, the second plaintiff)

(j) PW10 (Ahmad Roslan Mokhtar, a licensed land and engineering surveyor)

(k) PW11 (Raja Firdaus bin Raja Ismail, a land owner)

(i) PW12 (Liam Wee Lin, a consulting engineer specialising in hydrology and hydraulics)

[9] The witnesses called by the defendants were:

(a) DW1 (Gobi a/l Silvariju, the sub contractor)

(b) DW2 (Mohamad Amin bin Azahari, a JPS officer)

(c) DW3 (Lew Kwok Yen, a consultant engineer with second defendant)

(d) DW4 (Chuah Chai Yew, a civil and structural engineer)

(e) DW5 (Amran bin Mohd Nor, a district engineer for JKR Manjung)

The Law

[10] The parties are broadly in agreement as to the principles that apply to this case. It is accepted that there is a duty on any one who interferes with the course of a river to ensure that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by heavy rainfall. It is also accepted that if the said works impede the flow of the water and thereby cause the river to burst its banks, the contractor who carried out the works or the person having control over the obstruction will be liable to compensate the owners of adjoining properties for losses flowing from the flood. Equally, it is accepted that if the flood was unavoidable due to exceptionally heavy rain that was unprecedented, this would afford a complete defence to the plaintiffs claim in respect of the flood.

[11] In *Seong Fatt Sawmills Sdn Bhd v. Dunlop Malaysia Industries Sdn Bhd* [1984] 1 LNS 6; [1984] 1 MLJ 286, the Federal Court quoted with approval the following passage in the judgment of the House of Lords in the case of *Caledonian Railway v. Greenock Corporation* [1917] AC 556:

> It is the duty of anyone who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.

Expert Testimony

[12] There is a serious conflict of expert evidence on the cause of the flood. The plaintiffs' expert PW12 opined that the bund and the inadequate size of the culvert placed in the bund were the immediate causes for the flooding, whilst the defendants expert, DW4 disagreed. According to him, the flood occurred due to a combination of a few factors, namely exceptionally heavy rain and the occurrence of high tide in the river, downstream from the bund.

[13] I start with the report prepared by PW12. It will be helpful, if I set out the pertinent passages in his report that he took into consideration in coming to his conclusion:

> When it rains heavily as was the case during 19 October 2013, a flood flow will be generated and how high is the peak flood discharge depends on the catchment area, the steepness of the terrain and the land use. Conservatively, a rain of 79.mm/day would generate a flood discharge of 12m3/s (estimated based on JPS's HP11- See Appendix 4). When this high discharge arrives, it will find it difficult to flow downstream through a constricted outlet and to enable flow to go through the water level upstream will built up (rise higher than the downstream level) to create sufficient pressure to force the water through the constricted outlet. Consequently the upstream ponds were flooded. This was probably the phenomena when the flood occurred in 19 October 2013.
>
> The downstream ponds were not flooded since the flow in the river downstream was not blocked by any bunds. Therefore, the water level downstream of the bunds remains low on 19 October 2013. In fact when the flood overspilled into the ponds at 10.30 pm on 19 October 2013, it was (according to JUPEM's tide table) during low tide. The low tide level according to JUPEM's tide table is lower that RL-0.5m (see Appendix 1)

[14] He further mentioned that the normal acceptable practice of constructing a temporary structure across the river is to provide culvert(s) which meet the ten year annual rainfall intensity (ARI).

[15] On the other hand, DW4 gave a different account of the reasons for the flood:

> In order to understand the flooding of prawn farm, the above hydraulic study of the catchment area is referred. From all the report(s) the hydrological study and the newspaper report. There is no denial that the flood plain is flooded with water on 19 October 2013. In fact the hydrology study to prove the flood plain is flooded is academic only. This is so because the pictures show the flood situation quite clearly. The flooding is at both the upstream and downstream of the bund. The question is that why the flood level in the flood plain is so high. Is it the predicted rainstorm of 1:100 year? ...
>
> It is also good to check incidence occurs on 19 October 2013. The rainfall at that time the surrounding catchment areas needed to look into. From the report of the rainfall intensity on 19 October 2013 is 100mm. The Lumut tidal report on 19 October 2013 is as high as 3.2m ODL at about 3:0 am. In fact from 1:0am the tide is at 2.1 m already. The normal rainfall intensity is around the area is 21.6mm. Hence the rainstorm on the particular incidence is ready exceptional and unexpected. In other words it is more that 1:100 years rainstorm. The flood plain will be flooded with or without the pipe culvert and/or box culvert because the high tidal already exceeded the height of the bund. There is no way to prevent the flooding of the surrounding area which is below the level of 2.6m ODL. It is noted the prawn farm bund level is only 2.3m. Hence the flood occurs in the prawn farm not due to the temporary bund.

[16] DW4 also disagreed that a temporary structure blocking a river flow must meet the ten year flood criteria. According to him, it was sufficient if it met the five year criteria.

Issues For Determination

[17] There are essentially four issues for determination:

(a) Whether there was sufficient proximity between second and third defendants and the plaintiffs to give rise to a duty of care;

(b) Whether the flooding of the prawn farms was caused by the bund and/or culvert;

(c) Whether the defendants are entitled to rely on the defence of maxim of *volenti non fit injuria*;

(d) The damages that should be awarded to the plaintiffs if the answer to question (b) was in the affirmative and the answer to question (c) was in the negative.

Issue I: Whether There Was Sufficient Proximity Between Second And Third Defendants And The Plaintiffs To Give Rise To A Duty Of Care

[18] The second and third defendants alleged that there was no sufficient proximity between them and the plaintiffs as to give rise to a duty of care. This argument was formulated on the basis that the construction of the bund

A was not provided under the contract between them and the first defendant. As it was constructed by the first defendant on its own initiative, it was argued, they owed no duty of care.

[19] There is undisputable evidence that the first defendant's work was strictly supervised by the second defendant and DW3, as the resident B engineer of the second defendant, had the power to order the first defendant to stop work. Futhermore, it was DW3 who calculated the size of the culverts and confirmed that they were adequate to deal with heavy rainfall.

[20] In the light of these facts, I cannot accept the allegation that there was no sufficient proximity between them and the plaintiffs so as to give rise to C a duty of care.

Second Issue: Whether The Bund Was Cause Of The Flooding

[21] It bears mention here that although the experts differed on the fundamental question as to the cause of the flood, both however agrees on D one point. They were unanimous in their view that if the flood had covered the area downstream from the bund, this would indicate with certainty that the bund was not the cause for the flooding.

[22] It therefore becomes necessary to examine the evidence to determine whether there was flooding downstream. The plaintiffs witnesses maintained E that failure of the culvert to take the excessive rainfall going into the stream led to a situation where the stream overflowed at the point of the bund resulting in a flood upstream from the bund. They maintained that the area downstream was not flooded. On the other hand, the defendants alleged otherwise and relied on the testimony of DW1, the subcontractor appointed F by the first defendant to construct the bund. When DW1 was questioned on this point, he gave conflicting accounts. Initially he said the whole area was flooded, but later stated that he could not tell whether the downstream area beyond the bund was also flooded as it was pitch dark and visibility was poor.

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[23] The claim made by the plaintiffs that only the upstream was flooded is corroborated by the following pieces of evidence. It was in evidence that newspaper reporters had come to the flood site at about midnight and taken photographs of the bund. The photographs were published in the newspapers the next day under the heading, "Sebahagian jalan tanah kuning yang H merupakan akses ke tapak pembinaan jambatan juga dibanjiri air", suggesting that the bund was only partially covered with water. There is no mention in the report that the whole area was flooded as alleged by the defendants. The most compelling evidence that supports the version of the plaintiffs is the unchallenged testimony of PW3, a director in a company named Dindings I Aquatic Supplier Sdn Bhd. According to him, Dindings Aquatic Supplier Sdn Bhd's prawn farm located downstream, about 150m after the bund was not affected by the flood.

[24] The defence contended that it was not probable that Dindings Aquatic Supplier Sdn Bhd and the area downstream from the bund were not flooded because it was high tide at the material time. In light of this allegation, it is necessary to set out the tide readings prepared by the Hydrographic Centre of the Royal Malaysian Navy for 19 and 20 October 2013:

19th October 2013 (Saturday)

0am (1.5m)
1am (2.1m)
2am (2.7m)
3am (3.0m)
4am (3.2m)
5am (3.1m)
6am (2.7m)
7am (2.1m)
8am (1.5m)
9am (1.0m)
10am (0.7m)
11am (0.7m)
12pm (1.1m)
1pm (1.6m)
2pm (2.2m)
3pm (2.6m)
4pm (2.8m)
5pm (2.9m)
6pm (2.6m)
7pm (2.1m)
8pm (1.6m)
9pm (1.2m)
10pm (0.9m)
11pm (0.9m)

20th October 2013 (Sunday)

0am (1.2m)
1am (1.8m)
2am (2.4m)
3am (2.8m)

A 4am (3.1m)

5am (3.2m)

6am (2.9m)

[25] From the tide table, the tide gauge reading at 10.30pm on 19 October
B 2013, when the flood first occurred was 0.9m, the lowest tide of the day. The graph drawn by DW4 on the hourly tidal movement establishes this material fact. The graph shows that at 6pm on that day, the tide started to retreat towards the sea and the lowest tide occurred between 10pm to 11pm. The tide waters only started to move inland after midnight that day. It further
C shows that when the rain started at about 5.30pm on 19 October 2013, the tide waters had begun to retreat back towards the sea and the flooding occurred during the lowest tide around 10pm-11pm.

[26] On the aforesaid evidence, the claim that the flood occurred during high tide is unsustainable. The tidal readings negate the allegation that the
D flood occurred during high tide. On the evidence, I find that the area downstream from the bund did not flood.

[27] Before I proceed to deal with the other issues in this case, it is pertinent to examine the defence of exceptional rain. The defendants relied on the weather records from Huntly estate to prove their claim that there was
E exceptional rainfall of 100mm per day on the night of the flood. In cross-examination, DW2, the JPS officer admitted that Huntly estate does not actually fall within the catchment area for Sungai Ayer Tawar as it is situated 20km away and located near the town of Pantai Remis. He further agreed that Sitiawan and Titi Gantung rainfall stations which belong to the
F Meteorological Department of Malaysia are closer to the flood site, 10km and 18km respectively. Sitiawan is situated downstream and Titi Gantung upstream of the flood site. Both stations recorded rainfall amount of 79.2mm and 65.9mm respectively. It is apposite to mention here that DW2 admitted that the data from Meteorological Department of Malaysia are reliable and
G conclusive in this regard. It is important to note that under further cross-examination, DW2 conceded that the nearest JPS rainfall station to the flood site was Walbrook estate, located 5km away and the rainfall recorded was 85mm.

[28] These facts show quite clearly that the claim made by the defendants
H that there was rainfall of 100mm per day on the night of the flood is not accurate. The rainfall data in relation to Sitiawan, Titi Gantung and Walbrook estate are, in my view, more relevant and applicable to determine the amount of rainfall that fell on the night in question. Based on the data it is my finding that the rainfall was about 80 to 85 mm and not 100mm. This
I was not exceptional rainfall as alleged by the defendants.

[29] Next, I turn now to consider whether the culverts placed in the bund met the ARI criteria. It is common ground that the culverts must have the capacity to carry heavy rainfall going into the river. In designing a culvert, it was incumbent on the defendants to consider the rainfall records of the area to determine the heaviest rainfall that the area had experienced.

[30] As noted earlier, PW12 and DW4 could not agree on whether culverts placed in the bund must meet the ten or five year ARI. According to DW3, it was a JPS requirement that the culverts in temporary structures must meet the five year ARI criteria. However, his evidence was not supported by DW2 who explained that no special conditions were stipulated and he had left it to DW3 to determine the size of the culvert. In fact, DW2 under cross-examination agreed it was a fair statement for PW12 to state in his report that the common practice was to check if a flood normally of ten year ARI flood can pass through the blocked channel. In the absence of evidence to show that DW3 and DW4 hold any professional qualifications in hydrology, I am inclined to prefer the opinion expressed by PW12 and DW2 that the culverts must meet the ten year criteria. The culverts in the instant case were only designed to meet the five year ARI criteria and this explains why they were inadequate for the purpose of carrying the rain water and why the water overflowed.

[31] In the event, I am wrong in holding that the culverts should have met the ten year ARI criteria, I proceed to consider whether they at least met the five year ARI criteria. Huntly estate rainfall records relied upon by the first defendant show that on 11 July 2012, rainfall had touched 107mm per day. This was more than the 100mm rainfall amount which DW4 described as exceptional and unexpected. This was just one year before the date of the flood. The box culvert was thus not designed even for 100mm rainfall amount indicating that it did not even meet the five year ARI criteria. As the rain that fell at the flood site was actually less than the five year ARI, if the design of the culvert had even met that criteria. In my judgment, the water would have flowed through without causing damage. In light of DW4's admission that the culvert was not catered even for 100mm daily rainfall, it follows that the defendants failed to meet even the five year ARI flood criteria.

[32] The rainfall records also show that in Sitiawan, there were 14 instances where the rainfall within the period of 1999-2012 exceeded 100mm daily rainfall; the highest was 175.4mm on 21 October 2008, and in Titi Gantung, there were six instances where the rainfall within the period of 2004-2013 exceeded 100mm daily rainfall; the highest was 276mm on 18 November 2006. In these two areas alone, there were already a total of 20 instances within a period of just 13 years where the rainfall exceeded 100mm daily rainfall. In this connection, it is instructive to refer to the *dictum* of Lord Dunedin in *Greenock Corpn* (*supra*):

> The appellants argue that ... if they can show that this rainfall was much in excess of what had been previously observed in Greenock that is enough. I do not think that you can rightly confine your view to Greenock alone. No one can say that such rainfall was unprecedented in Scotland; and I think the appellants were bound to consider that some day Greenock might be subjected to the same rainfall as other places in Scotland had been subjected to.

Applying this principle here, it means even if the volume of rainfall received in Kg Baru was different from that in the adjacent areas, the defendants are still bound to consider that Kg Baru could at any time be subjected to the same rainfall received in nearby places such as Sitiawan and Titi Gantung. This they had failed to do so.

[33] There is yet one other point. DW4 stated that the flood site and prawns farms were a flood plain. It flooded everday during high tide. According to him when the tide table reading reached 2.6m and beyond, the area would be flooded because the pond embankments were lower than 2.6m. He further alleged that the bund itself was submerged 79 times in two months, and that the prawns farms experienced flooding everyday.

[34] If indeed this was so, it is odd that this material fact is not pleaded in the defence. Nor is it mentioned in the report prepared by the independent contractor engaged by the second and third defendants to investigate the cause of the flood. It is also difficult to comprehend the basis for DW4 to assert the area flooded everyday when by his own admission, he has never been to the site when the tide reading reached 3.2m. I reject DW4's claim that the area was a flood plain that flooded everyday.

[35] Having considered the evidence, I am unable to conclude in favour of the defendants that it was a combination of exceptional rain and incoming high tide had caused the flooding. On the contrary, the evidence tends to point in the opposite direction, namely that the flooding would not have occurred if the river had been in its natural state and not restricted by the bund that failed to provide a culvert of adequate size to carry water from the heavy rain. The defendants were in breach of their duty to ensure that the culvert placed in the bund was of adequate size.

Issue 3: Volenti Non Fit Injuria

[36] The defendants pointed out that the lands on which the plaintiffs operated their prawn farms were designated for oil palm planting. According to them, this was because oil palm trees would not be affected by the flooding of sea water during high tide. By operating the prawn farms in this area, the plaintiffs had assumed the risks inherent on the land. The defendants were thus entitled to rely on the defence of *volenti non fit injuria*. This defence simply means "that to which a man consents cannot be considered an injury". No act is actionable as a tort at the suit of any person who has

expressly or impliedly assented to it. Mere knowledge of a risk does not amount to consent. See *Lee Geok Theng v. Ngee Tai Hoo & Anor* [2000] 1 LNS 220; [2000] 4 MLJ 42.

[37] Again, I agree with the plaintiffs that the concept of *volenti non fit injuria* has no application to the facts. The prawn farms were operating for many years since 1997, without incident. The pond bunds had protected the ponds without a single incident until the bund was constructed by the defendants. The plaintiffs had never consented to the creation of the bund but had opposed it. I do not accept the argument that the plaintiffs use of lands designated for oil palm planting for prawn farming triggers the maxim of *volenti non fit injuria*. In any event, the evidence demonstrates that the lands along the river were suitable for both oil palm planting and prawn farming. The title deed for Lot 38806 where PW3's company operated the farm was designated for prawn breeding. The first plaintiff's prawn farm was close to PW3's farm.

[38] In any event, the maxim was never pleaded by the first defendant as a defence and nor was it an agreed issue for trial. If the first defendant wishes to rely on this defence, it must clearly plead (a) the facts of which the plaintiff was fully appraised giving rise to the risk of injury; (b) the plaintiff understood the risk and injury; and (c) the plaintiff voluntarily undertook to be responsible for the risk. See *Lee Geok Theng v. Ngee Tai Hoo & Anor* [2000] 1 LNS 220; [2000] 4 MLJ 42. The absence of any such plea, the defence fails.

Issue 4: Damages

[39] The function of damages in contract is primarily to put the injured party as far as possible in the position he would have been had the contract been performed. Whereas, the function of damages in tort is to put the injured party in the position in which he would have been if the tort had not been committed.

[40] The damages claimed by the plaintiffs were as follows:

The first plaintiff:

(a) Loss in sale value of prawn harvest - RM824,965.

(b) Expenses for restoring pond bunds - RM86,275.

(c) Expenses for survey plan - RM13,551.

(d) Expenses for hydraulic study - RM15,000.

(e) Expenses for water paddle spare part units - RM16,005.

(f) General damages for inconvenience - RM50,000.

(g) Exemplary damages at the rate of 30% on total compensatory amount (RM1,005,796) in the sum of RM301,738.

The second and third plaintiffs:

(a) Loss in sale value of prawn harvest - RM515,495.

(b) Expenses for survey plan - RM4,907.

(c) Expenses for hydraulic study - RM15,000.

(d) Expenses for water paddle spare part units - RM13,219.

(e) General damages for inconvenience - RM50,000.

(f) Exemplary damages at the rate of 30% on total compensatory amount (RM598,621) in the sum of RM179,586.

Loss Of Profits

[41] I deal first with the plaintiffs' claim for loss in sale value of prawn harvest ie, loss of profits. The law on this subject is set out in Lord Denning MRs judgment in *Anglia Television Ltd v. Reed* [1971] 3 All ER 690:

> It seems to me that a plaintiff in such a case as this has an election: he can either claim for loss of profits: or for his wasted expenditure but he must elect between them. He cannot claim both. If he has not suffered any loss of profit - or cannot prove what his profit would have been - he can claim in the alternative the expenditure which has been thrown away that is, wasted by reason of the breach. That is shown by *Cullinane v. British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292, 303, 308.
>
> If the plaintiff claims wasted expenditure, he is not limited to the expenditure incurred after the contract was concluded. He can claim also for expenditure incurred before the contract provided that it was such as would reasonably be in the contemplation of the parties as likely to be wasted if the contract was broken.

[42] The damages claimed by the plaintiffs under (a) is in essence a claim for the revenue that they would have earned if not for the flood. The plaintiffs contended that the expenses incurred in generating the revenue need not be deducted in determining the gross profit due to them. The following passage in *CCC Films (London) Ltd v. Impact Quadrant Films Ltd* [1984] 3 All ER 298 was cited in support of this proposition:

> It is, I think, important in this context to distinguish between the term 'loss of profit' and the term 'recovery of expenditure'. When Lord Denning MR speaks in *Anglia Television Ltd v. Reed* of the plaintiffs not having suffered loss of profits or of it being impossible for them to prove what their profits would have been, he is referring, I believe, to profits after recoupment of expenditure, ie net profits. The plaintiffs in *Anglia Television Ltd v. Reed* were by the defendant's breach deprived of putting to the test whether and to what extent they would have (a) recouped their expenditure and (b) gone on to make a net profit and of how much. It may well be that they could have led some evidence as to the probabilities in relation at least to the first of these matters. They had a script and no doubt they had budget and profit forecasts which could have been reinforced by evidence as to their experience with other similar projects.

[43] I find nothing in the passage cited above that supports the plaintiffs' submission that expenditure need not be deducted from revenue in a claim for loss of gross profits. Gross profit is a company's residual profit after selling a product or service and deducting the cost associated with its production and sale.

[44] The principle laid down in *Anglia Television Ltd v. Reed* was approved and applied by the Federal Court in *Ismail v. Haji Taib* [1972] 1 LNS 47; [1972] 1 MLJ 259. In *Hj Taib*, the appellant brought an action against the respondent/landlord for trespass and damages on the grounds that he was deprived of cultivating padi land and deriving benefit therefrom and had thereby suffered special and general damages. The court deducted a sum of RM500 as being expenses that the plaintiff incurred. Suffian FJ stated:

> As regards damages, as has already been stated the plaintiff claimed both special damages and general damages. Under special damages he claimed a sum of $1,224, the proceeds at $85 per kuncha of the padi which he estimated he would have harvested less the amount of padi he would have had to give the landlord by way of rent. The trial president allowed this claim though there was no evidence to show that the estimate was reasonable. Even if the estimate was reasonable, the plaintiff should not have been awarded the full sum claimed ($1,224), because there should be deducted from it what he would have had to spend on producing the estimated amount of padi. Here there was no evidence to suggest that the plaintiff had spent any money on the padi field, the evidence being merely that he had prepared the land for planting. The cost of preparing the land was assessed by the learned appeal judge at $500, which was also the figure assessed by the trial president as general damages. We think it reasonable to award the plaintiff by way special damages the sum of $1,224 less $500, the assessed cost of preparing the land.

[45] In *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777, Edgar Joseph FCJ explained the principle at p. 29 (CLJ); p. 796 (MLJ):

> When, as here, the purchaser has claimed loss of profits for anticipated sales, it would have to be assumed that these two awards are based on expenses which would have been incurred anyway. This point was made in *Cullinane v. British 'Rema' Manufacturing Co Ltd* [1954] 1 QB 292; [1953] 2 All ER 1257; [1953] 3 WLR 923 where it was held that a plaintiff could not claim both his capital loss, ie expenditure incurred, as well as his loss of gross profits. The plaintiff was required to choose between his two claims; in other words, he would have to elect between being put back into the position he would have been if the contract had not been made, that is to say recover his net outlay or claim what he would have received if the contract had been made, that is to say, recover his gross profits on lost sales.

[46] The cases discussed above illustrate that the plaintiffs' submission that a plaintiff need not deduct his expenses when claiming for loss of anticipated profits is untenable. A plaintiff can only claim for one or the other, but not both. It cannot be gainsaid that profits would only have been made if expenditure had been incurred.

[47] Revering to the present case, there is no evidence to show the expenditure that the plaintiffs have incurred and would have to incur to generate the loss of profits claimed as damages. No were tax returns produced to show the profits earned by the plaintiffs in the previous years. There is thus no evidence to show the amount of damages suffered by the plaintiffs as loss of profits.

[48] It is trite and settled law that where a plaintiff brings an action for damages, he must prove the actual damages or the reasonable compensation for it in accordance with the settled principles. In order to recover the damages, he has to discharge the burden of proving both the fact of damage and the amount of damage. Any failure to prove such damages will result in the refusal of the court to award such damages. See *Selva Kumar Murugiah v. Thiagarajah Retnasamy* [1995] 2 CLJ 374; [1995] 1 MLJ 817 (FC); *Voo Nyuk Fah & Anor v. Lam Yat Kheong & Anor* [2012] 5 CLJ 229; [2012] MLJU 159; [2012] AMEJ 0030 (CA); *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd*; [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635; [1989] 3 MLJ 360; *Guan Soon Tin Mining Co v. Ampang Estate Ltd* [1972] 1 LNS 39; [1973] 1 MLJ 25 and *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777; [1995] 1 AMR 41.

[49] In *Guan Soon Tin Mining Company v. Wong Fook Kum* [1968] 1 LNS 43; [1969] 1 MLJ 99, His Lordship Ong Hock Thye FJ in delivering the judgment of the Federal Court at p. 100 explained:

> The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed), para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p. 178:
>
> > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the Court, saying, 'This is what I have lost: I ask you to give me these damages'. They have to prove it.

[50] In the circumstances, I award nominal damages of RM50,000 to the first plaintiff and a sum of RM20,000 to the second and third plaintiffs.

Expenses For Restoring Bund

[51] The next head of damages is for expenses incurred for restoring pond bunds. This item is only claimed by the first plaintiff. It was in evidence that the invoice produced by the first plaintiff in support of the claim, included the cost of repairs and the cost of increasing the height of the existing prawn pond bunds by one feet. I agree with the defendants that the plaintiff is only entitled to claim the cost of repairs. I award the sum of RM20,000 in light of the admission of the first plaintiff's witness that he was unable to tell from the invoice what portion was for repair works.

Expenses For Survey Plan And Hydraulic Study

[52] The defendants did not dispute that the plaintiffs' entitlement to claim for the expenses incurred for the survey plan and hydraulic study, nor the quantum claimed. I therefore allow the sum of RM13,551 and RM15,000 claimed by them as expenses for survey plan and hydraulic study, respectively.

Expenses For Water Paddle Spare Part Units

[53] The plaintiffs claimed for expenses to replace the water paddle spare part units. I allow a sum of only RM5,000 in the absence of satisfactory evidence that the amount claimed was indeed incurred.

General Damages For Inconvenience

[54] I award a sum of RM10,000 to the plaintiffs as damages for inconvenience caused by the flood.

Exemplary Damages

[55] The plaintiffs also seek exemplary damages. In *Roshairee Abd Wahab v. Mejar Mustafa Omar & Ors* [1997] 1 CLJ (Supp) 39; [1997] 1 BLJ 39; [1996] 3 MLJ 337, James Foong J held:

> While considering the request for exemplary damages, this court must bear in mind that the objective for an award under this category is to punish the defendants, and to display the court's indignant attitude towards the acts committed by the defendants. However, through the enlighten judgment of Lord Devlin in *Rookes v. Barnard & Ors* [1964] AC 1129 (at p 1226), such damages must be restricted to situation where there are 'oppressive, arbitrary or unconstitutional action by the servants of the government' or where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff. Outside these two categories, exemplary damages should not be awarded.

[56] In *Malie Jolhi v. Pengarah Jabatan Alam Sekitar (Negeri Sarawak) Kementerian Sains, Teknologi & Alam Sekitar & Ors* [2011] 5 CLJ 83, VT Singham J echoed the same view:

> Exemplary damages, on the other hand, are not meant to merely compensate the tort victim but meant to punish the tortfeasor. Its application was discussed in the famous case of *Rookes v. Bernard* [1964] AC 1129. Exemplary damages is generally discouraged and awarded only in exceptional cases.

[57] Based on the principles stated in the foregoing cases, I disallow the claim for exemplary damages as the construction of the bund cannot be said be oppressive or arbitrary or an unconstitutional action by the servants of the Government. The bund was constructed to enable the defendants to build a bridge to connect Kg Baru and Kg Teluk for the convenience of the residents living in that area. It was not done with the intention of causing hardship and inconvenience to the prawn breeders.

Other points

Nuisance

[58] I reach a similar conclusion in relation to the plaintiffs' claim in nuisance. The bund was a potential nuisance which became an actual and actionable nuisance by reason of the culvert placed in the bund not meeting even the five year ARI criteria. It was inadequate to carry the rain water and diverted it on to the plaintiffs' land.

Strict Statutory Liability

[59] The law governing any acts affecting rivers in the State of Perak is found in the Waters Act 1920. Section 5(1) of the Waters Act expressly provides that no person shall, except under and in all accordance with the terms of a licence under the Act, *inter alia*, in any manner obstruct or interfere with any river.

[60] Section 13 of the Waters Act 1920 expressly provides that no licence under the Act shall exempt any person from liability in respect of any damage occasioned by such person to the property of the Government or of any person. I agree with the plaintiff that the liability to pay damages under the Waters Act is therefore one of strict liability. The first defendant is therefore liable to the plaintiffs for the damage suffered by them as a result of the construction of the bund. Section 17 of the Waters Act imposes liability on both the second and third defendants as the employer of the first defendant, to pay for the damage occasioned by the negligence of the first defendant.

Liability Of Joint Tortfeasors

[61] The plaintiffs contended, and I agree, that the second and third defendants are not only vicariously liable but also jointly and severally liable for the loss suffered by the plaintiffs. Their liability is based on the principle that if each of several persons, not acting in concert, commit a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the whole damage.

[62] This principle is lucidly explained in the judgment of the Federal Court in *Malaysia National Insurance Sdn Bhd v. Lim Tiok* [1997] 2 CLJ 351; [1997] 2 MLJ 165. In delivering the judgment of the Federal court, Edgar Joseph Jr FCJ said:

> To recapitulate, at common law, if each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each tortfeasor is liable for the same damage

Conclusion

[63] For the reasons given, I allow the plaintiffs claim for damages. Judgment is entered in favour of the first plaintiff in the sum of RM98,551 and the second and third plaintiffs in the sum of RM58,551. The first defendant to pay costs of RM50,000 to the plaintiffs. As agreed, the second and third defendants shall be indemnified by the first defendant in respect of the damages awarded to the plaintiffs.